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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PCAM, LLC, Cross-complainant and Respondent, v. BALLY TOTAL FITNESS OF CALIFORNIA, INC. et al., Cross-defendants and Appellants.	B277637; B285308 (Los Angeles County Super. Ct. No. BC493486)

APPEAL from judgments of the Superior Court of Los Angeles County. Gregory Alarcon, Judge. Judgment against Bally Total Fitness (case No. B277637) affirmed in part, reversed in part and remanded for a determination on expert witness fees; judgment against the Rusnak Family Trust (case No. B285308) reversed and remanded for a jury trial.

Manning & Kass, Ellrod, Ramirez, Trester, Anthony J. Ellrod and Steven J. Renick for Cross-defendants and Appellants.

Lewis Brisbois Bisgaard & Smith and Raul Martinez for Cross-complainant and Respondent.

SUMMARY

This is a dispute over whether the owner and the lessee of a parking lot (or either of them) must indemnify the parking lot operator for payments the operator made to settle lawsuits brought by the victim of an after-hours assault at the parking lot. Kenneth Fernandez was attacked and beaten in the parking lot. In his first lawsuit, he sued his three assailants along with Victoria Ruznak, as trustee of the Paul P. Rusnak Family Trust (Rusnak), which owned the lot; Bally Total Fitness of California, Inc. (Bally), which leased the lot; and PCAM, LLC, which operated the lot. Mr. Fernandez settled his claims. PCAM, Bally and Rusnak continued to dispute which among them was liable to pay the settlement amounts and litigation costs. The appellants here are Bally and Rusnak. The respondent is PCAM.

At the heart of the dispute between PCAM and Bally is the parking services contract between them. It had reciprocal indemnity provisions, requiring each to indemnify the other for claims arising from their own negligence. Another provision required PCAM to procure and maintain specified insurance coverages and to add Bally as an additional insured on those policies. PCAM's general liability policy from Fireman's Fund Insurance Company included Bally as an additional insured in the multicover endorsement, but the endorsement limited coverage to injury arising from PCAM's acts.

Bally tendered its defense of Mr. Fernandez's first lawsuit to PCAM. Fireman's Fund rejected the tender because it concluded PCAM was not negligent, so Bally was not covered. Bally contended PCAM breached the parking services contract by not expressly naming Bally as an additional insured on PCAM's general liability policy. Bally claimed it would have been covered for its

own negligence if PCAM had fulfilled its contractual duty to insure Bally.

PCAM was the first to reach a settlement with Mr. Fernandez. Bally, Rusnak, and Mr. Fernandez later reached an agreement by which Bally and Rusnak assigned to Mr. Fernandez their claims against PCAM in exchange for a covenant that Mr. Fernandez would not execute on any judgment he might obtain against Bally and Rusnak. They agreed to a trial by reference at which Bally did not contest liability or damages. Rusnak was dismissed. A judgment was entered against Bally.

Mr. Fernandez then filed the second lawsuit against PCAM based on Bally's and Rusnak's assignment of rights. PCAM filed a cross-complaint against Bally, Rusnak and the three assailants. Mr. Fernandez and PCAM agreed to a trial by reference and settled the second lawsuit. In a jury trial on PCAM's cross-complaint, Bally was found negligent and liable for PCAM's damages due to Bally's failure to indemnify PCAM. Later, the court conducted a bench trial on PCAM's cross-claims against Rusnak. The court concluded Rusnak was also negligent and obligated to indemnify PCAM for the amounts it paid to Mr. Fernandez.

Bally and Rusnak both appealed from the judgments entered against them on PCAM's cross-complaint. We consolidated the appeals for purposes of argument and decision because they arise from the same cross-complaint and because some of the issues raised are the same.

We affirm the judgment against Bally, except to the extent it awards expert witness fees, and we remand for a determination whether the parking contract permits the award of those fees. We reverse the judgment against Rusnak and remand for a jury trial.

FACTS

In the operative second amended cross-complaint, PCAM alleged causes of action for express indemnity, declaratory relief, and breach of contract against Bally. PCAM alleged causes of action for equitable indemnity and declaratory relief against Rusnak. The unusual procedural history of the litigation unfolded as follows.

1. The Parties and the Parking Contract

Rusnak is the owner and lessor of a parking lot in Pasadena that it leased (along with and adjacent to other property and improvements) to Bally. Bally used the parking lot for the customers of its fitness facility. Bally entered into a "Parking Service Agreement" (the parking contract) with PCAM. Under the parking contract, PCAM was granted a revocable license "to provide [Bally's] patrons and employees with the services of a fully staffed parking service" at various parking facilities, including the Pasadena parking lot. The contract required PCAM to "provide attended parking solely for [Bally's] members, its employees and other persons as [Bally], in its sole discretion, shall direct," and required PCAM to "have the [parking lot] open and operating during [Bally's] business hours."

The parking contract required PCAM to procure and maintain specified insurance coverages. PCAM was required to "add [Bally] and any other party designated by [Bally] as an additional insured on such policies and provide [Bally] with a Certificate of Insurance . . . along with the applicable additional insured endorsement evidencing of such coverage . . . ."

The parking contract also contained cross-indemnity provisions, under which PCAM and Bally agreed to hold each other harmless from liability arising from the party's own negligence or willful misconduct. Specifically:

> "[PCAM] shall defend, indemnify and hold harmless [Bally] . . . from any claim, damage, cost or liability arising out of or relating to the performance or non-performance by [PCAM] or its employees provided that [PCAM] shall not be responsible or liable for any injury or damage incurred by any Facility Patron or any other persons which is unrelated to [PCAM's] performance hereunder, or which was not caused by the negligence or willful misconduct of [PCAM] or its employees. [Bally] hereby agrees to defend, indemnify, and hold harmless [PCAM] from liability for any injury or damage arising from [Bally's] negligence or willful misconduct."

2. The Events and Litigation Generating the Cross-complaint

On May 28, 2009, at about 1:00 a.m., Kenneth Fernandez was assaulted and beaten by three male assailants in the Pasadena parking lot described above. The parking lot was unattended. (Bally's fitness center closed at 12:00 a.m., so PCAM was not required to have an attendant on duty.)

a. The Pasadena action

In 2010, Mr. Fernandez sued PCAM, Bally, Rusnak, and his three assailants. (The parties refer to the 2010 lawsuit as the Pasadena action.) Among other things, Mr. Fernandez contended Bally had a duty to provide a safe parking lot, and breached that duty because the parking lot was "unsafe, poorly lit, and unattended, fostering the circumstances under which [Mr. Fernandez] was violently attacked and for which he suffered physical, mental, and emotional injuries."

The Pasadena action was prosecuted and resolved as follows.

PCAM's insurer, Fireman's Fund, defended PCAM, and in March 2012 settled the Pasadena action with Mr. Fernandez for

$25,000. Mr. Fernandez executed a release in favor of PCAM, and PCAM was dismissed from the Pasadena action.

Bally tendered its defense to PCAM and PCAM's insurer, Fireman's Fund. Fireman's Fund declined to defend and indemnify Bally against Mr. Fernandez's claim. The insurer informed Bally that, while the policy it issued to PCAM "would define Bally's as an additional insured," this was "only for our insured's [PCAM's] acts or omissions," and Fireman's Fund did not find any negligence on the part of PCAM.

Bally, Rusnak, and Mr. Fernandez then entered into a joint agreement for a trial by reference (Code Civ. Proc., § 638) and assignment of rights.[1] The parties agreed on two principal points. Bally and Rusnak assigned all their interests in any causes of action against PCAM (their claims that PCAM breached its insurance and indemnity obligations under the parking contract) to Mr. Fernandez, in return for Mr. Fernandez's covenant not to execute on any judgment Mr. Fernandez obtained against Bally and Rusnak in the pending (Pasadena) litigation. And, the parties agreed to a trial by reference before retired judge Peter D. Lichtman, stipulating among other things that all evidence presented would be admissible, and that Rusnak would be dismissed with prejudice in exchange for a waiver of fees and costs.[2] Bally and Rusnak agreed to fully cooperate and assist

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[1] Code of Civil Procedure section 638 permits parties to agree to the appointment of a referee to "hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision." (*Id.,* subd. (a).)

[2] According to the trial court, the lease agreement for the parking lot required Bally to indemnify Rusnak for damages arising out of the operation of the parking lot, "and any damages against Rusnak would have been Bally's responsibility."

Mr. Fernandez with all reasonable efforts to recover on the assigned breach of contract claims against PCAM.

Before the trial by reference began, counsel for Mr. Fernandez and Bally stipulated that Bally "would not contest liability." (Bally's counsel left the trial after 15 or 20 minutes.) Plaintiff's evidence was received without objection and "establish[ed] that Bally is liable for all of plaintiff's personal injuries." The evidence included an expert's opinion that "Bally's conduct fell below the generally acceptable requirements for care in providing a secure parking facility due to the lack of adequate staffing, security, lighting and overall maintenance of the premises."

In July 2012, Judge Lichtman issued a statement of decision on Mr. Fernandez's negligence claim against Bally. Judge Lichtman awarded Mr. Fernandez $220,000 for general pain and suffering; $65,000 for present and future medical costs; and $650,000 for loss of earning capacity. The proportionate share of fault was allocated as 70 percent to the three assailants, 15 percent to Bally, and 15 percent to PCAM.

PCAM was not notified of or invited to participate in the trial by reference.

On August 21, 2012, the trial court adopted Judge Lichtman's statement of decision and entered judgment against Bally in the amount of $752,935.39. (This consisted of 15 percent of the $220,000 pain and suffering award; the awards for medical costs and loss of earning capacity; and $4,935.39 in litigation costs.)[3]

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[3] "Proposition 51, effective June 4, 1986, modified the common law rule of joint and several liability by limiting a tortfeasor's liability for noneconomic damages to the proportion of such damages equal to the tortfeasor's own percentage of fault." (*Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 524, italics and fn. omitted.)

b. The Los Angeles action

i. Mr. Fernandez's complaint

In October 2012, Mr. Fernandez sued PCAM pursuant to the assignment of Bally's claims that PCAM breached its insurance and indemnity obligations under the parking contract. (The parties refer to the 2012 lawsuit as the Los Angeles action.) His complaint alleged PCAM breached the parking contract with Bally "by failing to[] indemnify and defend Bally" during the Pasadena action; PCAM "failed to satisfy their obligation as a result of the Judgment against Bally"; and PCAM breached the implied covenant of good faith and fair dealing "by refusing to defend, indemnify or procure insurance necessary to relieve Bally of all liability."

ii. PCAM's cross-complaint

In November 2012, PCAM answered Mr. Fernandez's complaint and filed a cross-complaint against Bally, Rusnak and the three assailants. After demurrers were sustained to PCAM's cross-complaint and first amended cross-complaint, PCAM filed the operative second amended cross-complaint in October 2013 (the cross-complaint).

PCAM's cross-complaint against Bally alleged breach of an express indemnity agreement. The cross-complaint alleged PCAM's duty to defend and indemnify Bally under the parking contract was "expressly predicated upon and require[d] negligence or willful misconduct on the part of PCAM" and specifically excluded any duty to indemnify Bally "for any claim or injury unrelated to the performance of . . . PCAM under the terms of the contract, or where PCAM was not negligent and did not engage in willful misconduct." PCAM alleged that Mr. Fernandez's allegations in the Pasadena action constituted a claim of negligence on Bally's part, giving rise to a duty by Bally to hold harmless PCAM from any liability for damage arising from Bally's negligence. PCAM alleged it incurred

costs, attorney fees and damages in excess of $58,624 in defending itself in the Pasadena action, and Bally refused to indemnify PCAM in material breach of the parking contract.

PCAM's cross-complaint further alleged that as a result of Mr. Fernandez's claims of negligence against Bally and of Bally's own negligence, Bally was expressly obligated to indemnify PCAM "for any judgments, costs and attorney's fees arising from [PCAM's] defense in the [Pasadena action], and for attorney's fees incurred in enforcement of the contract in the instant action." PCAM alleged that as a result of Bally's breach, PCAM "incurred damages in excess of $58,624, and in an amount to be proven at trial."

In its cause of action for equitable indemnity against Rusnak and the three assailants, PCAM alleged it was "entitled to partial or total indemnity from Cross-Defendants, for any judgments, costs and attorney's fees arising from its defense in the [Pasadena action], of the instant Complaint [by Mr. Fernandez as Bally's assignee], or any other Cross-Complaints filed in this action." PCAM sought a declaration "as to Bally's liability to [PCAM] for [PCAM's] attorney's fees, costs and expenses associated with enforcement of the [parking] contract and in prosecution of this Cross-Complaint against Bally's."

iii. The resolution of Mr. Fernandez's complaint against PCAM

In September 2014, PCAM and Mr. Fernandez entered into a joint agreement for a trial by reference (Code Civ. Proc., § 638) in the Los Angeles action. (In the earlier Pasadena action, Mr. Fernandez had entered into a separate agreement with Bally and Rusnak for a trial by reference of a different issue heard by a different referee.) In the Los Angeles action, the parties sought a decision from referee Bruce Friedman "regarding an issue in the case related to the proper interpretation of [the parking] contract,"

and agreed the referee would decide "facts and issues necessary to enable the court to determine the liability portion of the action (i.e. the breach or non-breach of the [parking] contract at issue in Fernandez's Complaint.)." The parties agreed to submit Mr. Friedman's decision to the court as an order or ruling, retaining their rights to appeal any ruling reached during the reference.

On September 18, 2014, Mr. Friedman issued his decision, based on the parties' briefs and stipulations to certain facts and documents. The referee's ruling stated that Mr. Fernandez submitted a single issue for consideration: "Did PCAM satisfy its contractual obligation to add Bally as an additional insured and provide a Certificate of Insurance by procuring a MultiCover Endorsement from its insurer Fireman's Fund?" The referee's answer was "no."[4]

The referee's ruling also stated that PCAM submitted a second issue "as to whether PCAM was contractually obligated to defend and/or indemnify Bally in the underlying Fernandez

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[4] The ruling explained: "The MultiCover Endorsement expands the definition of who is an insured under the policy to include an organization which PCAM agreed to add as an additional insured, but this is not the same as naming Bally as an additional insured. The MultiCover Endorsement limits the additional insured coverage to bodily injury caused by PCAM's acts or omissions and does not provide the scope of coverage that would apply if Bally was named as an additional insured under the policy as required by the [parking contract] . . . . [¶] There is no limiting language in the [parking contract] with respect to the scope of insurance coverage to be afforded to Bally as an additional insured. Bally would have been entitled to coverage under the Fireman's Fund policy if it had been named as an additional insured in contrast to having to rely on the additional insured definition in the MultiCover Endorsement which limits the coverage to bodily injury arising out of PCAM's acts."

lawsuit." However, "[b]ecause PCAM breached its obligation to name Bally as an additional insured, it is unnecessary to decide whether PCAM had an obligation to defend and indemnify Bally in the underlying case. As [PCAM] states in its brief, breach as to either of the contractual issues submitted for decision establishes PCAM's liability in this case."

In July 2015, Mr. Fernandez notified the court that he and PCAM had reached a settlement, and Fireman's Fund, on behalf of PCAM, paid Mr. Fernandez $375,000 to settle the Los Angeles action.

c. The trial on PCAM's cross-complaint in the Los Angeles action

Remaining for resolution in the Los Angeles action were PCAM's cross-complaint against Bally for express indemnification and breach of contract, and against Rusnak for equitable indemnification.

A jury trial began on September 28, 2015.

Before trial, PCAM filed a motion in limine to preclude Bally from making any inquiry, comment or argument before the jury concerning referee Friedman's findings in the PCAM/Fernandez trial by reference (on PCAM's contractual obligation to add Bally as an additional insured).[5] The trial court granted PCAM's motion, excluding the referee's decision "because the moving party [Bally] did not consent to the [reference] procedure."

Bally sought by motion in limine to exclude evidence or argument "that in any way relates to PCAM's claims for express or equitable indemnity arising out of this action." The trial court

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[5] Bally also filed a motion in limine on the issue, asking for an order "[t]hat the fact that PCAM breached the [parking contract] between PCAM and Bally be deemed established."

denied this motion as an "[a]ttempt to summarily adjudicate an issue or defense."

At trial, PCAM sought indemnification for the $25,000 Fireman's Fund paid Mr. Fernandez to settle the Pasadena action and the costs incurred in litigating that action, and for the $375,000 Fireman's Fund paid Mr. Fernandez to settle the Los Angeles action plus attorney fees, for a total of more than $720,000. PCAM presented testimony from (among others) William Ragsdale, the Fireman's Fund claims adjuster who denied Bally's tender of defense based on finding no negligence by PCAM; Mark Israel, an insurance expert; and Eric Chaves (PCAM's president).

Mr. Ragsdale testified that Fireman's Fund considered Bally to be an additional insured under PCAM's policy, but only with respect to injury or damage arising from PCAM's negligence or misconduct. Mr. Ragsdale testified the multicover endorsement satisfied the parking contract's requirement that an additional insured endorsement be issued to Bally. Bally was an additional insured but not a "co-insured" (the latter being a status that would put Bally "on an equal footing with the primary insurance policy holder," increasing the risk and the premium). Mr. Ragsdale also testified to the amounts Fireman's Fund paid to settle the Pasadena and Los Angeles actions, and that Fireman's Fund paid PCAM's defense costs in those two cases ($20,198.99 in the Pasadena action and $310,102.25 in the Los Angeles action, with additional costs that would be billed to Fireman's Fund "for the trial in this action").

Mr. Chaves, PCAM's president, testified to his view that the parking contract "just allowed [PCAM] to do parking services," not to install lighting or security cameras, erect gates or provide security services.

Mr. Israel, PCAM's insurance expert, testified that "it's very common and customary in commercial practice . . . that the

additional insured endorsement is limited to the operations, liability arising out of the operations of the named insured." He testified the multicover endorsement was "a commercially reasonable type of form to obtain in response to" the parking contract's requirements. He opined that Mr. Ragsdale was correct in concluding there was no connection between PCAM's operations and the injury to Mr. Fernandez, observing PCAM was not required to provide security and was not required to have (and did not have) an employee present when Mr. Fernandez was injured. He pointed out PCAM was not the owner or lessee of the parking lot, and had only a license to provide parking services.

After the conclusion of PCAM's case, both sides rested.[6]

The jury returned a special verdict on October 5, 2015, finding Bally was negligent; the parking contract obligated Bally to hold PCAM harmless from liability arising from Bally's negligence; Bally breached the terms of the parking contract by refusing to indemnify PCAM; and PCAM was harmed by Bally's breach.[7]

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[6] Bally filed a motion for a directed verdict on October 2, 2015, the date PCAM's evidence was concluded. The motion was denied on October 23, 2015.

[7] The jury answered "yes" to these six questions: "Did PCAM and Bally's enter into a contract?" "Was the contract valid and effective on May 28, 2009, the day plaintiff, Kenneth Fernandez was beaten in the parking lot?" "Was Bally's negligent such to have actually and proximately caused Kenneth Fernandez's injuries and damages, as alleged by Kenneth Fernandez in the Pasadena Action?" "As part of the contract, was Bally's obligated to 'defend, indemnify, and hold harmless' PCAM from liability for any injury or damage arising from Bally's negligence?" "Did Bally's breach the terms of the contract by refusing to defend, indemnify, or hold harmless PCAM for any judgments, settlements, costs or attorney's fees arising from PCAM's defense in the Pasadena action, or the

The special verdict found PCAM's damages to be $676,000, which was "the amount of damages or settlement amounts, if any, which Bally's failed to pay to or on behalf of PCAM from the Los Angeles action." (The jury found no damages in connection with the Pasadena action.)[8]

d. Posttrial proceedings

On November 12, 2015, PCAM filed a motion for attorney fees under the attorney fee provision of the parking contract, seeking $253,808.05 in fees, "in addition to PCAM's other recoverable costs," from Bally and Rusnak. A few days later, PCAM filed a memorandum of costs, after which Bally and Rusnak filed a motion to tax costs.

On January 13, 2016, the trial court granted PCAM's motion for attorney fees, awarding "attorneys' fees, costs and expenses, in the total amount of $253,808.05" against Bally. (The court denied the motion as to Rusnak.) On March 9, 2016, the court denied Bally and Rusnak's motion to tax costs.

On May 31, 2016, the trial court entered judgment on the special verdict in favor of PCAM and against Bally in the amount of

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current action, the Los Angeles action?" "Was PCAM harmed by Bally's breach?"

[8] Question No. 7 on damages had three parts, as follows:

"A. What is the amount of the attorney's fees and costs, if any, which Bally's failed to pay to or on behalf of PCAM from the Pasadena action? [¶] Answer: $ 0

"B. What is the amount of damages or settlement amounts, if any, which Bally's failed to pay to or on behalf of PCAM from the Pasadena action? [¶] Answer: $ 0

"C. What is the amount of damages or settlement amounts, if any, which Bally's failed to pay to or on behalf of PCAM from the Los Angeles action? [¶] Answer: $ 676,000."

$715,882.41. The judgment states the amount "includes $375,000 in damages awarded by the jury on the Special Verdict and [PCAM's] Costs in the amount of $340,882.41 . . . ." (The latter number consists of the $253,808.05 attorney fee award and $87,074.36 in other costs stated in PCAM's memorandum of costs.)[9]

Bally filed motions for a new trial and judgment notwithstanding the verdict (JNOV), both of which were denied.

Bally filed a timely appeal from the judgment and all rulings prior to entry of judgment, including the attorney fee award and the order denying Bally's motion to tax costs, and from the postjudgment order denying its new trial and JNOV motions.

e. Postjury trial proceedings: Rusnak

Several months after the jury's special verdict, at the end of a hearing on attorney fees in January 2016, PCAM's counsel told the court there were "unresolved issues regarding the judgment." PCAM's counsel requested a court trial on its equitable claims against Rusnak.

Counsel for Bally and Rusnak appeared to be caught by surprise. He responded that the trial was over when the jury trial against Bally and Rusnak ended. PCAM's counsel replied that PCAM only rested its case against Bally, and there had been a "de facto" bifurcation of PCAM's claims against Rusnak. After some discussion, counsel for Bally and Rusnak said, "[T]his is outrageous.

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[9] The special verdict found "the amount of damages or settlement amounts" Bally failed to pay in the Los Angeles action to be $676,000. The settlement payment was only $375,000, so the jury apparently included litigation costs in the $676,000 number. Because PCAM's attorney fees and costs were separately awarded, PCAM's proposed judgment reduced the $676,000 to $375,000 to avoid a partial double recovery of attorney fees.

We tried a case before this jury against both Bally and Rusnak. They put on their evidence and rested."

The parties agreed to brief the issue for the next hearing date.

The parties argued the matter on February 3, 2016. PCAM's counsel reported the record showed that counsel and the court had not discussed how the equitable indemnity issue was to be resolved. PCAM's counsel stated that "[w]e certainly never waived it" and "never submitted any issues to the jury related to Rusnak or any of that because it would have been improper, it's before Your Honor."

Rusnak's position was that "[t]he claim against Rusnak has been abandoned." Counsel contended equitable indemnity is a legal claim, not an equitable claim, citing *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 (*Martin*) ("a cause of action for equitable indemnity is a legal action seeking legal relief," entitling the cross-defendant to a jury trial). The issue "should have gone to the jury," and "[t]he fact that [PCAM] failed to ask the jury to do it and allowed the jury to be dismissed, constitutes an abandonment of the claim. There's nothing further to be done here."

The court took the issue under submission, but did not rule until the date that had been set for "[p]hase 2 of the trial," September 13, 2016. On that date, the court first indicated it would proceed by jury trial, but after reading new joint statements, decided on a court trial, stating the cross-complaint against Rusnak was "a standard equitable indemnity and declaration of rights, without a contract or damages."

Before opening statements, Rusnak's counsel reiterated its position "that Rusnak is entitled to a jury on the equitable indemnity claim under *Martin,*" and that if a court trial were deemed appropriate, the court "should decide that claim against Rusnak on the evidence that was presented at the trial," not on any additional evidence.

Trial proceeded on September 13 and 14, with PCAM and Rusnak both offering expert witnesses on the issue of appropriate security at the parking lot. Five months later, closing arguments were presented, and the court ordered counsel to submit proposed statements of decision.

The court served its proposed statement of decision on the parties, and on June 7, 2017, overruled Rusnak's objections and filed the statement of decision. The court found Rusnak had a nondelegable duty to keep its premises safe and breached that duty; Rusnak was obligated to indemnify PCAM under equitable indemnity principles; and "that PCAM be awarded the $400,000 spent in settlements in the two underlying actions."

Judgment was entered on July 19, 2017, and Rusnak filed a timely notice of appeal.

DISCUSSION

1. Bally's Appeal (Case No. B277637)

Bally challenges the judgment on six grounds. Only Bally's final claim concerning expert witness fees has merit.

a. The claim that PCAM "lacked standing"

Bally's first contention is that PCAM suffered no damage as a result of Bally's breach of contract, because Fireman's Fund, PCAM's insurer, paid all the settlements and defense costs, and there is no evidence in the record that PCAM was prosecuting this action on behalf of its insurer. Rusnak raises the same argument. It is meritless.

The Fireman's Fund insurance policy provides that, "[i]f the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring suit or transfer those rights to us and help us enforce them."

Bally admits that Fireman's Fund "had the option of pursuing [its] right of recovery in either its own name, in the name of its insured, or by having the insured pursue the claim on Fireman's Fund's behalf." (See, e.g., *Reusche v. California Pacific Title Ins. Co.* (1965) 231 Cal.App.2d 731, 739 ["A litigant does not lack standing merely because he has been fully compensated by an insurer [citations]. An action may be continued in the name of the original party even where he transfers his interest [citation]."]; see also Code Civ. Proc., § 368.5 ["An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."].)

Bally insists, however, that "there is not a shred of evidence" that PCAM transferred its interest to Fireman's Fund, and instead there are "clear indications" that PCAM "was pursuing this action against Bally on its own behalf." (For this, Bally cites PCAM counsel's statements in final argument to the jury that it did not matter that PCAM's insurance company paid the damages ("[f]rom a legal standpoint, that's between [PCAM] and Fireman's Fund").

Bally's claim is baseless. For one thing, Bally cites no authority suggesting evidence must be presented that PCAM's interest was transferred to Fireman's Fund. Counsel's statement to the jury was simply one way of expressing the legal rule. Further, the jury was instructed, with PCAM's proposed special instruction No. 2, on this very subject, and Bally does not contend in its briefs that it objected to the instruction. The court instructed the jury that "a lawsuit may continue in the name of the original owner of the interest, or the court may allow the recipient of the transfer to be substituted in the lawsuit. [¶] The law permits a recipient of

the transfer to pursue the action in the name of the original party for the recipient's benefit and protection. [¶] *Fireman's Fund Insurance Company is the recipient of the transfer of the rights and interest of [PCAM]. As the recipient of this interest, Fireman's Fund Insurance Company can pursue the interest in the name of [PCAM].*" (Italics added.) It is far too late for Bally now to suggest that "evidence" is required on this point.

b. The claim there is "no basis" for finding Bally liable for indemnification of PCAM's $375,000 settlement in the Los Angeles action

Bally contends the damages award has "no basis" because Bally had no contractual obligation to defend and indemnify PCAM "for Bally's own breach of contract claim against PCAM." Bally's argument is so contrived and illogical that we find it difficult to describe, though we do our best to explain the contrivance below.

Bally argues that because Mr. Fernandez in the Los Angeles action was asserting Bally's assigned claim for breach of contract against PCAM (that PCAM failed to indemnify and defend Bally), Bally cannot be liable to PCAM for the $375,000 PCAM paid Mr. Fernandez to settle that claim. Bally's peculiar theory is that Bally would be indemnifying PCAM for PCAM's own breach (failing to provide insurance coverage to Bally). This mischaracterization of PCAM's cross-complaint and theory of recovery permeates Bally's briefing, and is simply wrong.

Bally repeatedly asserts that Mr. Fernandez's complaint against PCAM was a breach of contract claim, not a tort claim, and from there concludes that the parking contract's indemnification provision "cannot apply to the claims made by Fernandez against PCAM in the Los Angeles action." This non sequitur ignores that the jury verdict resolved PCAM's cross-complaint by finding Bally's

negligence caused Mr. Fernandez's damages, and Bally was liable to indemnify PCAM. Mr. Fernandez's claims against PCAM on the complaint have nothing to do with Bally's tort liability as alleged in the cross-complaint.[10]

PCAM's cross-complaint alleged, and PCAM contended and proved at trial, that Bally was negligent and "actually and proximately caused" Mr. Fernandez's injuries; and that Bally was obligated under the parking contract to indemnify PCAM from liability "for any injury or damage arising from Bally's negligence." PCAM contended and proved at trial that Bally breached the contract by refusing to indemnify PCAM for "judgments, settlements, costs or attorney's fees" arising from PCAM's defense in either action. None of the damages PCAM sought to recover would have been incurred, including the settlement of Mr. Fernandez's breach of contract claim, were it not for the negligence – Bally's – that caused Mr. Fernandez's injuries.

In short, Bally has demonstrated no error in the jury's finding that the indemnity agreement in the parking contract entitled PCAM to recover all damages incurred in the Los Angeles action.

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[10] Bally's ensuing discussion of the inapplicability of comparative fault principles to contract claims is similarly off-point. The same is true of Bally's argument that PCAM cannot claim equitable indemnification against Bally in relation to the Los Angeles action, on the ground that case law excludes contract liability from the scope of equitable indemnity. In any event, PCAM's claim against Bally (and the jury's verdict) were premised on express contractual indemnity, not equitable indemnity.

c. The claim that PCAM's cross-complaint did not seek damages relating to the Los Angeles action

Bally also contends that PCAM's operative cross-complaint sought damages *only* for the settlement and litigation costs in the Pasadena action, and *not* for the $375,000 settlement and litigation costs in the Los Angeles action. But for the error in allowing the jury to consider the latter claim, Bally argues, judgment would have been in Bally's favor, since the jury awarded no damages relating to the Pasadena action.

We reject this claim. We do not read the cross-complaint as narrowly as Bally does. But even if we were to do so, a variance between pleading and proof "is not a basis for reversal unless it prejudicially misleads a party. A variance must be disregarded if the issues on which the decision is actually based were fully and fairly tried." (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143-144; *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 16 (*Frank Pisano*) [a variance is not material " 'unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits' "].)

Bally has not demonstrated it was "actually misled" to its prejudice in maintaining its defense on the merits. On the contrary, it was clear from the outset that Bally was well aware PCAM was seeking indemnification for the settlement in the Los Angeles action. Indeed, as described earlier, Bally sought by motion in limine to exclude evidence or argument "that in any way relates to PCAM's claims for express or equitable indemnity arising out of this [the Los Angeles] action." The trial court denied that motion, so Bally knew before the jury trial began that PCAM was seeking indemnification for the settlement in the Los Angeles action.

The trial court denied Bally's motion in limine as an "[a]ttempt to summarily adjudicate an issue or defense" and because there was "[n]o meet and confer." The court's ruling further stated that "[c]ounsel can object at trial, cross examine, and provide special jury instructions regarding this issue." Bally's brief fails to identify any objections to evidence presented at trial, or any special jury instructions it proposed at trial, or any objection to the special verdict form (question 5) that asked the jury to decide whether Bally breached the contract by refusing to hold PCAM harmless for any settlements in the Pasadena or Los Angeles actions. On this basis alone, it is hard to see any reason to conclude Bally was "actually misled" to its prejudice.

Bally says its motion in limine shows that it did not "acquiesce to the presentation of this claim at trial." Whether or not Bally acquiesced in the trial court's ruling, the question is whether the trial court erred when it denied Bally's motion in limine. On this point, Bally fails even to identify or acknowledge the abuse of discretion standard of review. (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 295 ["We review a trial court's ruling on a motion in limine to exclude evidence for an abuse of discretion."].) Bally does not tell us why the court's stated reasons for denying its motion in limine were wrong, and does not acknowledge the court's ruling that Bally could raise objections at trial (and for the most part did not). It is plain Bally has demonstrated no abuse of discretion.

Bally's argument focuses on PCAM's allegation in the cross-complaint that Bally was obligated to indemnify PCAM for amounts paid in the Pasadena action, "and for attorney's fees incurred in enforcement of the contract in the instant action." That is, PCAM did not allege (in the express indemnity cause of action) that it was seeking indemnity for any judgment or settlement in the Los

Angeles action.[11] But PCAM's declaratory relief claim against Bally and Rusnak broadly alleged that each of them had "an express duty to indemnify [PCAM] pursuant to the [parking] contract . . . and/or have an equitable duty to indemnify [PCAM] for their negligent and/or intentional conduct."

All this is to say that, while the cross-complaint could have been more clear, by the time of trial, no one could reasonably have remained in doubt about the relief PCAM sought.[12] Bally does not tell us how it was misled to its prejudice in its defense of the cross-complaint.

In sum, the entire trial was conducted, from opening statements to closing argument, through presentation of evidence, jury instructions, and the special verdict form, to establish Bally's obligation to indemnify PCAM with respect to both the Pasadena and the Los Angeles actions. " 'It has long been settled law that where (1) a case is tried on the merits, (2) the issues are thoroughly explored during the course of the trial and (3) the theory of the trial is well known to court and counsel, the fact that the issues were not pleaded does not preclude an adjudication of such litigated issues

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[11] The operative cross-complaint was filed in October 2013, some 19 months before PCAM settled with Mr. Fernandez in July 2015.

[12] Bally states several times that PCAM "explicitly stated that it was not making such a claim [for defense or indemnification as to the Los Angeles action] as part of its second amended cross-complaint." This refers to – and mischaracterizes – statements by PCAM in papers filed in opposition to Bally's unsuccessful demurrer to the operative cross-complaint. The demurrer papers were filed long before the jury trial. We are not persuaded anything said in PCAM's opposition to Bally's demurrer misled Bally at the time of trial.

and a review thereof on appeal.' " (*Frank Pisano, supra,* 29 Cal.App.3d at p. 16.) That is the case here.

d. The referee's ruling that PCAM breached the insurance provisions of the parking contract

As described in the fact section (pt. 2.c., *ante*), the trial court granted PCAM's motion in limine to preclude Bally from using the referee's decision in the Los Angeles trial by reference between Mr. Fernandez and PCAM. Bruce Friedman, the referee in the Los Angeles action, found PCAM breached its contract to name Bally as an additional insured. Mr. Friedman reasoned that Bally would have been entitled to coverage under the Fireman's Fund policy if it had been named as an additional insured rather than having to rely on the additional insured definition in the multicover endorsement which limits the coverage to injury arising from PCAM's acts.

At trial, PCAM presented testimony that its multicover endorsement satisfied the parking contract's requirement that an additional insured endorsement be issued to Bally, and was "a commercially reasonable type of form to obtain in response to" the parking contract's requirements. Bally cross-examined PCAM's witnesses, but presented no expert or other testimony on the point.

Bally contends on appeal that the referee's decision in the trial by reference was binding on PCAM in the trial of its cross-complaint against Bally, and PCAM was collaterally estopped from arguing that it did not breach its contractual obligations to Bally. Bally says a finding by the trial court that PCAM was bound by the referee's decision "would have been fatal to PCAM's claims against Bally," because PCAM's breach of the parking contract relieved Bally of its contractual obligations to PCAM.

Bally's argument is meritless. Bally once again contorts and dodges the issue and the standard of review. The issue is whether

the trial court erred in its ruling on the motion in limine, and we review that ruling for abuse of discretion. The test for abuse of the trial court's broad discretion in ruling on the admissibility of evidence is whether the court " ' "exceeded the bounds of reason." ' " (*Tudor Ranches, Inc. v. State Compensation Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) "Moreover, even where evidence is improperly excluded, the error is not reversible unless ' "it is reasonably probable a result more favorable to the appellant would have been reached absent the error." ' " (*Id.* at pp. 1431-1432.) Bally discusses none of this in its opening brief.

In its reply brief, Bally tells us that, as we know, an error of law is an abuse of discretion. According to Bally, allowing PCAM to "relitigate" the breach of contract issue was an error of law and "not really an issue of excluding evidence." Bally goes on to argue it was prejudiced because, as it stated in its opening brief, the referee's decision that PCAM breached the parking contract would have been "fatal" to PCAM's claims against Bally. This is a mistaken notion.

The referee decided only that PCAM should have procured a separate additional insured endorsement for Bally rather than relying on the multicover endorsement. The referee expressly did *not* decide whether PCAM was contractually obligated to defend and/or indemnify Bally against Mr. Fernandez's claims. And, the referee did *not* decide that PCAM's breach of the insurance provision (paragraph 7) excused Bally from its duty under paragraph 8 to defend and indemnify PCAM from liability for any damage arising from Bally's negligence. (See *Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 334 (*Verdier*) ["If the covenants [in a contract] are independent, breach of one does not excuse performance of the other. [Citation.] The question is wholly one of construction of the agreement."].) "To construe covenants as dependent is to work a forfeiture as to one party, and no obligation

of a contract is to be regarded as a condition precedent unless made so by express terms or necessary implication." (*Ibid.*)

In short, we can see no error – and certainly no prejudice – in the trial court's exclusion of the referee's decision, because PCAM's breach of the promise to name Bally as an additional insured (the referee's decision) is irrelevant to whether Bally had a duty to indemnify PCAM for Bally's own negligence. Bally tells us that PCAM's breach of its obligation to obtain the required insurance "relieved Bally of any contractual obligation it might have had to indemnify PCAM," but Bally does not tell us why this is so. It is clearly not so. (*Verdier, supra,* 133 Cal.App.2d at p. 334.)

Even if there had been an error in excluding the referee's decision from evidence, Bally has not demonstrated the prejudice necessary to show reversible error. The two separate provisions of the parking contract – PCAM's obligation to add Bally as an additional insured, and Bally's obligation to indemnify PCAM from liability for Bally's negligence – are independent of each other; there is no indication in the parking contract that one is a condition precedent to the other. (See *Verdier, supra,* 133 Cal.App.2d at p. 334.) Bally has cited no authority (and it offered no evidence at trial) supporting a contrary conclusion.

The referee's ruling was limited, and did not involve the critical issues – Bally's negligence and its obligation to hold PCAM harmless from damage arising from that negligence. The jury decided those issues. The jury was fully instructed on contract principles, and must necessarily have concluded there was no material breach or failure of consideration by PCAM. Bally does not suggest there was any instructional error or lack of evidence to support the jury's conclusions. Because of the limited scope of the referee's findings, and the independent nature of the contractual provisions at issue, Bally cannot show any probability of a more

favorable outcome if the court had permitted the jury to hear those findings.

e. Attorney fees

Bally challenges the trial court's award of attorney fees of $253,808.05, the amount PCAM requested. Bally contends the declaration of PCAM's counsel that PCAM incurred attorney fees in that amount, together with billing statements counsel declared to be true and correct copies, were "insufficient to support PCAM's claim." Bally claims the billing statements were inadmissible hearsay and were not "correct" copies because "[e]verything of substance has been blacked-out." Bally also says the bills improperly include work on the Fernandez complaint, and PCAM did not prove the hours spent were necessary and reasonable. All Bally's claims are without merit.

Bally again fails to mention the standard of review – abuse of discretion. "As we have explained: 'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong" ' – meaning that it abused its discretion." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; *ibid.* [citing authority that an appellate court "will interfere with a determination of reasonable attorney fees 'only where there has been a manifest abuse of discretion' "].)

Bally refers us to hearsay and other provisions of the Evidence Code, but cites no case authority supporting the application of those provisions to the circumstances of this case. There is no pertinent support offered for the assertion that the billing statements were inadmissible, or that PCAM was required to offer unredacted copies of the statements. The billing statements were authenticated by counsel and, while redacted, set forth the

number of hours spent on each entry and the billing rate for that time. "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.

In addition, during the trial the court heard testimony from Mr. Ragsdale, who testified that PCAM's insurer, Fireman's Fund, paid $310,102.25 for attorney fees and costs in the Los Angeles action, and that he reviewed the bills and confirmed they represented the attorney fees and costs billed to Fireman's Fund for the defense of PCAM in the Los Angeles action. (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2018) ¶ 8:1025, p. 8D-6 ["bills for services rendered may be admissible for *nonhearsay* purposes; e.g., to corroborate testimony that a party incurred the liability"].)

Next, Bally contends that under the parking contract, PCAM could recover only the fees incurred in litigating its cross-complaint. Bally complains that the billing statements reflected all the legal work performed from the time Mr. Fernandez filed his complaint against PCAM, and PCAM made no effort to separate the fees for its defense of the Fernandez complaint from the fees for its prosecution of the cross-complaint.

The court observed in its decision that apportionment was "not required where the prevailing party is forced to defend against claims in order to prevail on contract claims," and that "[w]here parties provide no factual basis for apportioning costs, judges have the discretion not to apportion." Here, PCAM was forced to defend against the contract claims assigned to Mr. Fernandez by Bally, and those were related to Bally's negligence, for which Bally contractually agreed to indemnify PCAM. It was not unreasonable to conclude that the issues in the Fernandez complaint and the

cross-complaint were related, and that nothing in the contract operated to limit PCAM's recovery to fees incurred in prosecution of the cross-complaint. And it was reasonable to conclude that apportionment was not feasible. (See *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 [" '[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.' . . . Here, the court could reasonably find that appellants' various claims were ' "inextricably intertwined" ' [citation], making it 'impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units' [citation]."].)

In short, the trial court was in the best position to determine whether allocation was required "or whether the issues were so intertwined that allocation would be impossible." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 556.) Bally has not demonstrated the trial court's ruling " ' " ' "exceed[ed] the bounds of reason, all of the circumstances before it being considered." ' " ' " (*Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1083.)

Finally, Bally contends PCAM did not establish that "any of the blacked-out work 'shown' in [the billing statements] was either necessary to the litigation of the cross-complaint, or that the time spent on that item of work was reasonable." Again, Bally fails to acknowledge that "it was the trial judge who was in the best position to assess the value of the professional services rendered in his court." (*Rey v. Madera Unified School District* (2012) 203 Cal.App.4th 1223, 1245.) In this case, the court necessarily concluded the work performed was both necessary and reasonable.

f. Expert witness fees

One of the items in PCAM's memorandum of costs was $49,925 for "Expert fees (per Code of Civil Procedure section 998)." Bally moved to tax those costs, pointing out that PCAM's statutory offer to compromise was dated July 8, 2015; PCAM's documentation showed all the expert fees sought were incurred before that date; and section 998 provides for a plaintiff's recovery of "postoffer costs of the services of expert witnesses," not pre-offer costs.[13]

In its opposition in the trial court, PCAM mis-cited the applicable section 998 provisions, but also contended it was entitled to recover its expert costs under the parking contract, which entitles the prevailing party "to receive attorney's fees, costs *and expenses* from the other party." (Italics added.) PCAM argued that because this language was "much more expansive than just the enumerated costs in the Code of Civil Procedure," PCAM was not limited to "simply statutory costs." Bally argued in response that such costs, "lacking a statutory basis, cannot be claimed through a post-trial memorandum of costs."

The trial court denied Bally's motion to tax costs, stating that section 998 does not limit expert witness costs to postoffer costs. This was error, as the statute clearly states otherwise. (Code Civ. Proc., § 998, subd. (d).)

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[13] "If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover *postoffer* costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs." (Code Civ. Proc., § 998, subd. (d), italics added.)

The question remaining is whether the parking contract entitles PCAM to its expenses for expert witness fees. Bally has not directly addressed that question in its briefs. In its opening brief, Bally says only that the trial court was wrong on the section 998 issue, and that PCAM did not request fees on the basis of the parking contract. PCAM responds, without elaboration, that it "was separately entitled to expert witness fees" under the parking contract, and cites the principle that a ruling "correct in law will not be disturbed on appeal merely because it was given for the wrong reason." (*Belair v. Riverside County Flood Control District* (1998) 47 Cal.3d 550, 568.) In reply, Bally argues (as it did on the attorney fee issue) that PCAM may only recover costs associated with the cross-complaint, not those associated with Mr. Fernandez's complaint, and "there is no way to tell" from the exhibits whether the expert services were provided in connection with Mr. Fernandez's complaint, the cross-complaint, or a combination of the two.

For the reasons we have stated on the attorney fee issue (pt. 1.e., *ante*), we reject Bally's contention that PCAM can only recover costs directly associated with the cross-complaint. Nonetheless, while Bally's briefing seems to assume that the parking contract (which entitles the prevailing party to "attorney's fees, costs and expenses") would otherwise permit recovery of expert witness fees, Bally has not expressly conceded that point, which may depend on the intent of the parties. We conclude the better approach is to remand the matter to permit the trial court to decide that issue in the first instance.

2. The Rusnak Appeal (Case No. B285308)

Rusnak challenges the judgment on several grounds in addition to those we have rejected in Bally's appeal. We agree with Rusnak that it was entitled to a jury trial on PCAM's claim for

equitable indemnification, and we also agree that the jury's finding (and the trial by reference finding in the Pasadena action) that Bally was negligent cannot be given collateral estoppel effect to establish Rusnak's negligence. Consequently, because denial of the right to a jury trial is reversible error per se, with no need to show actual prejudice, we conclude retrial of the equitable indemnification claim before a jury is required.

a. The jury trial issue

In *Martin, supra,* 51 Cal.App.4th at page 698, the court concluded that "a cause of action for equitable indemnity is a legal action seeking legal relief," and the cross-defendant in that case was entitled to a jury trial. *Martin* was the first California case to address the issue directly, and remains the only California authority to have done so. We find the court's analysis thorough and compelling, and PCAM offers us no reasonable basis for reaching a different conclusion.

Martin recites the general principles. The right to a jury trial "is the right as it existed at common law in 1850, when the Constitution was first adopted," and " 'is a matter of right in a civil action at law, but not in equity.' " (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal. 3d 1, 8.) In determining whether an action is at law or in equity, " ' "the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case--the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law." ' [Citation.] On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial." (*Id.* at p. 9.) "Although . . . 'the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded' [citation], the prayer for relief in a

particular case is not conclusive [citations]. Thus, 'The fact that damages is one of a full range of possible remedies does not guarantee . . . the right to a jury . . . .' " (*Ibid.*)

While an equitable indemnity action "involves the application of equitable principles," *Martin* points out: " 'From the fact that equitable principles are . . . used to establish the alleged liability of the defendants, it does not necessarily follow that the action to enforce that liability is equitable. The law courts now recognize and apply many equitable principles and grant relief based thereon where, as here, legal relief is sought in the form of a judgment for a specific amount. . . .' " (*Martin, supra,* 51 Cal.App.4th at p. 694.)

The doctrine of equitable indemnity did not exist when the Constitution was adopted in 1850. Because the doctrine "is of modern vintage, we must examine its 'gist' to determine whether it gives rise to a legal or an equitable action." (*Martin, supra,* 51 Cal.App.4th at pp. 694, 695.) *Martin* found that, while no reported California case had held parties to an equitable indemnity action were entitled to trial by jury, "the appellate courts have consistently upheld jury verdicts in such cases." (*Ibid.*, citing cases.) "Conversely, we are aware of no California cases which question the right to a jury trial in equitable indemnity actions." (*Ibid.*)

We can see no reason in this case to disagree with *Martin's* analysis. As in *Martin*, PCAM's cross-complaint sought the equitable remedy of declaratory relief and the legal remedy of money damages ("indemnity . . . for any judgments, costs and attorney's fees") against Rusnak. (Indeed, the judgment against Rusnak ordered that PCAM recover judgment in its favor "in the amount of $400,000.00 in compensatory damages with interest thereon . . . .") The legal remedy would afford PCAM complete relief. Accordingly, Rusnak was entitled to a jury trial.

PCAM tells us Rusnak has not shown prejudicial error, but that is not the standard. (*Martin, supra,* 51 Cal.App.4th at p. 698 ["Equally unpersuasive is the suggestion that the error was harmless. The denial of the right to jury trial is reversible error per se. [Citations.] No showing of actual prejudice is required."].) Retrial of the equitable indemnification claim before a jury is required.

b. The collateral estoppel claim

PCAM tells us the jury trial issue is of "no consequence" because Rusnak cannot prevail as a matter of law. Bally was found to be negligent, both in the trial by reference in the Pasadena action, and in the jury trial in this action. These negligence findings against Bally, PCAM contends, "were binding on Rusnak as a *matter of law, not fact*," based on principles of collateral estoppel. There too PCAM is mistaken.

Under collateral estoppel principles, an issue "necessarily decided in prior litigation may be conclusively determined as against the parties or their privies in a subsequent lawsuit on a different cause of action." (*Roos v. Red* (2005) 130 Cal.App.4th 870, 879.) "Collateral estoppel applies when (1) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the prior action and (3) the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated." (*Ibid.*)

PCAM's argument runs aground on the third element – the requirement that the issue decided in the prior adjudication (Bally's negligence) be "identical" to the issue in the current proceeding (Rusnak's negligence). The two issues are not identical, and none of the cases PCAM cites to support its claim (that Bally and Rusnak

"had the same nondelegable duty to maintain the parking lot in a reasonably safe condition") actually does so.

While we do not disagree that a commercial landlord has certain nondelegable duties, they are not identical to the duties of the lessee of commercial property. The rule is this, as stated in the very cases PCAM cites: " 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises *before possession is transferred* so as to prevent any unreasonable risk of harm to the public who may enter. [Citations.] An agreement to renew a lease or relet the premises . . . cannot relieve the lessor of his duty to see that the premises are reasonably safe *at that time*.' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134, italics added; see also *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 (*Mora*) ["respondent, as the commercial landowner, owed no duty to appellant for defective conditions which occurred after the property was transferred to its commercial tenant(s) if the premises were reasonably safe at the time the tenant(s) took possession"].)

Of course, a commercial landowner "cannot totally abrogate its landowner responsibilities merely by signing a lease." (*Mora, supra,* 210 Cal.App.3d at p. 781.) "As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. [Citations.] *At the time the lease is executed and upon renewal* a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions." (*Ibid.*, italics added.)

PCAM has cited no evidence from the record that addressed conditions in the parking lot when Rusnak leased it to Bally, nor do

we even know when that lease was executed.[14] In other words, the trial by reference findings that Bally failed "to ensure that a parking attendant was present," "to maintain proper lighting," "to limit ingress and egress," and so on, do not describe duties for which Rusnak, as a commercial landowner, was also responsible as a matter of law. The questions whether the parking lot was reasonably safe when the property was transferred to Bally and whether Rusnak had reason to know of any unsafe conditions on the premises were not "necessarily decided" in the trial by reference or by the jury.

In short, the third element required for application of collateral estoppel – that "the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated" (*Roos v. Red, supra,* 130 Cal.App.4th at p. 879) – has not been established. As a consequence, we need not decide whether Bally and Rusnak were in privity with each other for collateral estoppel purposes, as the doctrine does not apply in any event. The findings of negligence on Bally's part may not be imputed to Rusnak.

c. Rusnak's claim of no legal basis for an equitable indemnification claim based on the Los Angeles action

Rusnak also contends that in any event it cannot be liable for equitable indemnification with respect to the $375,000 settlement PCAM paid in the Los Angeles action, because that was a contract action, not a tort action. Rusnak cites *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1040 ("It is well settled in California that equitable indemnity is

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[14] The lease does not appear in the appellate record. It was a trial exhibit, number 8, in both the jury trial and the bench trial, and the trial court's statement of decision refers to its indemnification provision. (See fn. 2, *ante*.)

only available among *tortfeasors* who are jointly and severally liable for the plaintiff's injury"; "[w]ith limited exception, there must be some basis for tort liability against the proposed indemnitor".). Since Mr. Fernandez's claim in the Los Angeles action sought damages for breach of contract and PCAM paid to settle that claim, Rusnak concludes, equitable indemnification cannot apply. We do not agree.

As with Bally's similar claim in the context of contractual indemnity (see Discussion, pt. 1.b., *ante*), Rusnak's view of equitable indemnity is too constricted by far. It is well settled that indemnity is an "obligation resting on one party to make good a loss or damage another party has incurred," and that this obligation may arise "from the equities of particular circumstances." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628; *Aetna Life & Casualty Co. v. Ford Motor Co.* (1975) 50 Cal.App.3d 49, 52 ["A right to indemnity may arise . . . from the equities of a given situation" and "[i]t applies in cases in which one party pays a debt for which another is primarily liable and which in equity and good conscience should have been paid by the latter party"].)

PCAM's claim is that there *was* a basis for tort liability against Rusnak in the Pasadena action, and none of the damages PCAM sought to recover, including its settlement payment to Mr. Fernandez for his assigned breach of contract claim in the Los Angeles action, would have been incurred were it not for the alleged negligence – here, Rusnak's – that caused Mr. Fernandez's injuries. Otherwise stated, PCAM alleges those damages ultimately arose from Rusnak's negligence, and under equitable indemnity principles, Rusnak is obligated to indemnify PCAM for that liability. Under these circumstances, we cannot say as a matter of law that there is no basis for an equitable indemnity claim.

d. Rusnak's substantial evidence argument

Finally, Rusnak asserts no substantial evidence was submitted, during either the jury trial or the court trial, to support findings that Rusnak breached its duty of care to Mr. Fernandez, or that any alleged breach caused his injuries. Because a jury trial is necessary to decide those issues, there is no occasion for us to review Rusnak's contentions.

DISPOSITION

The judgment against Bally (case No. B277637) is reversed to the extent it awards expert witness fees, and the cause is remanded for a determination whether the parking contract permits the award of expert witness fees. The judgment is otherwise affirmed. PCAM shall recover its costs on appeal.

The judgment against Rusnak (case No. B285308) is reversed and the cause is remanded for a jury trial consistent with the views expressed in this opinion. Rusnak shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.